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Supreme Court, U.S.
FILED
SEP 11 1987
JOSEPH F. SPANIOL, JR.
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No. 87-247

In The

Supreme Court of the United States

October Term, 1987

CORN BELT BANK,

Cross-Petitioner,

vs.

BERNARD ARMSTRONG,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Is income derived from the liquidation of farm equipment to be considered as income derived from a "farming operation" as defined by the Bankruptcy Code.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

In the Seventh Circuit, Corn Belt Bank was the Appellee. Bernard Armstrong was the debtor-appellant.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not reported and appears at Appendix A, p. A-1. The Order of the United States Court

of Appeals for the Seventh Circuit denying the Petition for Rehearing is not reported and appears at Appendix B, p. A-16. The Order and Opinion of the United States District Court of the Central District of Illinois is not reported and appears at Appendix C, p. A-17. The Opinion and Order of the United States Bankruptcy Court for the Central District of Illinois is not reported and appears at Appendix D, p. A-30.

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JURISDICTION

This Petition was taken from an order dated February 8, 1987, from the Seventh Circuit Court of Appeals and a denial for rehearing from the Seventh Circuit Court of Appeals dated May 14, 1987. Jurisdiction is conferred by 28 U.S.C. Sections 1293, 1334, 1408, 1471, and by 1291. Petition for Certiorari jurisdiction is conferred by 28 U.S.C. Rules 17, 19, 20, 21 and 11.

—o—

STATUTES AND RULES INVOLVED

Section 303(a) of the Bankruptcy Code (11 U.S.C. Sec. 303(a))

An involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer or corporation that is not a moneyed,

business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

Section 101(17) of the Bankruptcy Code (11 U.S.C. Sec. 101(17))

"farmer" means person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person.

Section 101(18) of the Bankruptcy Code (11 U.S.C. Sec. 101(18))

"farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.

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STATEMENT OF THE CASE

The Corn Belt Bank, now known as BancMidwest of McLean County, N.A., and hereinafter referred to as "CBB", filed a petition seeking to have Bernard Armstrong, hereinafter called "Armstrong", declared an involuntary bankrupt pursuant to 11 USC Section 303 on March 31, 1982. On that date, Armstrong owed CBB approximately Four Hundred Ninety Three Thousand Eight Hundred Sixteen Dollars and twenty-nine cents

($493,816.29), and had also personally guaranteed an additional Four Hundred Fifty Thousand Dollars ($450,000.00) of liabilities of Armstrong Hybrid Seed Company. Armstrong Hybrid Seed Company had previously filed for bankruptcy. In the year prior to the bankruptcy petition, Armstrong had sold substantially all his farming machinery, given up farming land that he had tenant farmed for a Trust, and rented out land that he and his wife owned on a cash basis.

The land that Armstrong rented out was approximately 240 acres and he received One hundred forty five Dollars ($145.00) per acre from the tenant as his sole compensation. His sole obligation under the lease was to provide lime for the acreage at his expense.

The sale of his farm equipment in 1981 derived Twenty nine thousand five hundred Dollars ($29,500.00) in income. The cash rental derived Seventeen thousand one hundred eighty one dollars and fifty cents ($17,181.50). The total income for taxable year 1981 was Ninety nine thousand ninety three Dollars ($99,093.00). No corresponding purchase of new or replacement equipment was made by Armstrong for the equipment sold.

On December 1, 1982, the Bankruptcy Court ruled that Armstrong be adjudicated a debtor under Chapter 7 of the Bankruptcy Code and further found that Armstrong was not a farmer within the meaning of the Code. The Bankruptcy Court found that of the $99,093.00 of income for taxable year 1981, $38,332.50 constituted income from a farm operation which represented only 38.68% of the total gross income for 1981. Specifically excluded from farm income was the monies derived from the sale of the equipment and the monies derived from cash rental of land.

On January 14, 1983, by agreement and stipulation of the parties, the order entered on December 1, 1982, was modified only as to the ultimate issue of whether or not Armstrong should be adjudicated a debtor. The Court specifically retained its ruling that Armstrong was not a "farmer".

On May 31, 1985, after hearing further evidence, the Bankruptcy Court concluded that Armstrong was a debtor pursuant to the Bankrupt Code; that as of the date of the filing of the petition that CBB held at least $5,000.00 in claims, not contingent as to liability or subject to bona fide dispute; that Armstrong was not generally paying his debts as those debts came due; and that portions of Armstrong's testimony were not convincing.

On June 7, 1985, Armstrong appealed the Bankruptcy Court's rulings to the District Court for the Central District of Illinois. On December 10, 1985, the District Court affirmed the Bankruptcy Court. On February 9, 1987, the United States Court of Appeals for the Seventh Circuit affirmed the lower court rulings, but found that the sale of farming equipment should have been considered as received from the farm operation. Notwithstanding that finding, it found that less than 80% of Armstrong's income was derived from farming operations. On May 14, 1987, a request for a rehearing was denied by the Appellate Court. The Appellant subsequently caused a Petition for a Writ to be docketed in this Court.

———o———

ARGUMENT ON CROSS APPEAL
REASONS FOR GRANTING THE WRIT

The cross petitioner respectfully petitions this court to grant a Writ of Certiorari with respect to the Court of Appeals decision of February 8, 1987, dealing with the sale of farm equipment being considered farm income, if this Court grants a Writ of Certiorari to the original petitioner, Bernard Armstrong. If the Court denies the Petition for a Writ to the original petitioner, Bernard Armstrong, then this request for a Writ is moot.

The Bankruptcy Court, the District Court, and the Seventh Circuit Court of Appeals determined that petitioner Armstrong was not a "farmer" as a farmer is defined by the Bankruptcy Act of 1978, as amended. The Seventh Circuit Court of Appeals though did in its decision affirming the decision of the Bankruptcy Court and the District Court incorrectly conclude that income derived from the liquidation of farm equipment should properly be included as income derived from a farming operation as set out in 11 USC Sec. 101 (17) (18).

The Bankruptcy Court and the District Court had previously found that the income derived from the sale of farm machinery should not be considered "farm income". The Appellate Court concluded that a number of cases had included farm equipment as "tools of the trade" when determining exemptions under the Code. Thus, they concluded the same should hold true when considering whether income from the sale of these "tools" would be farm income. The Appellate Court has misplaced reliance upon these cases. Bernard Armstrong was not exempting his "tools of the trade". He was liquidating them along

with his farming operation. The need for an exemption contemplates a continuation of the use of the "tools" in the bankrupt's profession and thus the need for protection. The liquidation of the "tools" eliminates the need for protection. If we examine the concept of risk associated with a farming operation and the historical reason setting up a different standard for placing a farmer in involuntary bankruptcy we must conclude that there is no element of risk involved with Armstrong's wholesale liquidation of the farm equipment. The overriding purpose of the exception is to protect those whose principal source of income is subject to fluctuations from weather, crop prices, and crop production. *In re Hines* 7 B. R. 415 (Bankruptcy D.S.D. 1980) We find no correlation with the liquidation of farm equipment. An individual who receives a substantial portion of his income from equipment sales which contain none of the inherent dangers that concerned the legislature, should not be able to hide behind this protection but must be treated as any other debtor. There is no basis for including them within the definitions of Sec. 101 (17) and (18).

It is important to note that the restrictive interpretations of these sections in this case need not worry the Court in setting an unusual precedent. It is clear from the evidence presented that Armstrong never intended to replace the equipment sold nor enter into the functions set out in Sec. 101 (18), such as: . . . .

> "Farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." 11 USC Sec. 101 (18)

Armstrong was moving away from farming and into other endeavors, he had given up the land that he had farmed for others, he had rented out his land on a cash basis and he had sold his equipment. He was no more a farmer than a garageman is after he sells his garage.

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CONCLUSION

The income derived from the wholesale liquidation of the farm equipment is not income derived from a farming operation. By the time Armstrong sold his farm equipment, he was not a farmer and the Appellate Court erred in concluding that because farm equipment may be considered "tools of the trade" in determining exemptions, its sale must also be included in determining what is and what is not farm income.

For the foregoing reasons if the Court grants the original petition for a Writ it must also grant the cross petition.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 85-3186

BERNARD ARMSTRONG

Debtor-Appellant,

vs.

CORN BELT BANK,

Appellee.

Appeal from the United States Bankruptcy Court
for the Central District of Illinois.
Nos. 382-00487. 85-3351—Basil H. Coutrakon, Judge

ARGUED MAY 15, 1986—DECIDED FEBRUARY 9, 1987

Before CUDAHY and FLAUM, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.*

CAMPBELL, *Senior District Judge*. Debtor-appellant Bernard Armstrong seeks to avoid being placed in involuntary bankruptcy pursuant to 11 U.S.C. § 303, *et seq.* He appeals determinations by the bankruptcy court and the district court that he is *not* a farmer within the meaning of 11 U.S.C. §§ 303(a) and 101(17) and (18) and that he *is* a debtor within the meaning of 11 U.S.C. § 303(h)(1).

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* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

For the reasons set forth below, we affirm the rulings of the lower tribunals.

On March 31, 1982, appellee, the Corn Belt Bank, now known as BancMidwest of McLean County, N.A., commenced this action by filing a petition seeking to place Armstrong in involuntary bankruptcy under Chapter 11. Undisputably, Armstrong's primary source of income since 1939 has been derived from farming activities. Involuntary cases such as the one at bar are not permitted against a person deemed to be a farmer pursuant to 11 U.S.C. § 303(a). Section 303(a) reads:

> An involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer or a corporation that is not a moneyed business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(18). 11 U.S.C. § 101(17) reads:

However, to be considered a farmer, and to be protected from involuntary Chapter 11 proceedings, one must meet the stringent criteria set forth at 11 U.S.C. §§ 101(17) and

> "farmer" means person that received more than 80 percent of such person's gross income during the taxable year of such person immediately proceeding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person.

11 U.S.C. § 101(18) defines a farming operation in the following manner:

> "farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising

> of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.

The lower tribunals ruled that less than 81% of Armstrong's taxable income for 1981, the relevant time period, was derived from farming. They also ruled Armstrong was a debtor within the meaning of 11 U.S.C. § 303(h)(1), *infra*. These two determinations subject Armstrong to involuntary Chapter 11 proceedings. In this appeal Armstrong objects to the two determinations. We first provide some perspective behind the dispute, then address the "farmer issue" (§§ 101(17) and (18)) and close with the "debtor issue" (§ 303(h)(1)).

I

The parties are in agreement concerning the sources of Armstrong's gross income for 1981. How that income should be classified pursuant to §§ 101(17) and (18) is the crux of the dispute. Armstrong's gross income for 1981 is as follows:

Sale of Beans	$33,175.00
Sale of Corn	4,932.00
Sale of Machinery	29,500.00
Elevator Patronage Dividend	72.00
Farming Rent	17,181.50
Gasoline Tax Credit	61.00
Gasoline Tax Refund	92.50
Interest from Farm Account	1,701.00
Wages from Armstrong Seed Co.	12,000.00
Non-farm Interest	350.00
Non-farm Interest	28.00
TOTAL GROSS	$99,093.00

First, the parties agree that income Armstrong received from the sale of beans and corn should be considered

as derived from a farming operation within the meaning of §§ 101(17) and (18). Secondly, the bankruptcy court ruled no evidence was presented by appellee concerning the gasoline tax credit or refund or the elevator patronage dividend. Therefore, it ruled the bank failed to meet its burden of proof concerning these items and they would be considered as income from farming operations (see bankruptcy court decision of December 1, 1982, page 4). This result (or waiver) is not contested on appeal. Tre dollar amounts surrounding these items appear inconsequential. The parties further agree that the income received from wages from the Armstrong Hybrid Seed Company and the "non-farm interest" monies do not constitute income from farming operations within the meaning of §§ 101(17) and (18). This leaves us with three final items—income Armstrong received from the sale of farm machinery, money received from acreage Armstrong rented to a third party and interest income received from a farm account of Armstrong's.

The lower tribunals ruled these three items do not constitute income received from farming operations within the meaning of §§ 101(17) and (18). Armstrong argues on appeal that all three items should be considered as derived from his farming operation. We hold the sale of the farming equipment should have been considered as received from the farming operation, reversing the ruling of the lower tribunals on this item. However, we affirm the lower courts' ruling that the rental income and interest from the farm account was not received from the farming operation. Hence, after some calculating, while we differ from the lower tribunals on how the sale of the farming equipment should be treated, our affirmance on the other items means

Armstrong has still failed to demonstrate that over 80% of his income was derived from farming operations. Armstrong's plight remains the same, but the means to the end is to be altered.

II

We agree with appellant that the lower courts' rulings on the sale of the farm machinery were simply too rigid an analysis when one takes into account the purpose and history behind the relevant statutory law and the broad interpretation to be given to the bankruptcy code in general. In the instant case Armstrong's farm machinery was inescapably interwoven with his farming operation. Importantly, it is undisputed Armstrong was never in the business of buying, selling or trading such machinery. The machinery was purchased to work the acreage that represented Armstrong's farming operation. Had the farm prospered, the machinery would have stayed in Armstrong's possession. He bought the machinery so the farm could exist and prosper. But for the machinery, there would be no farm. Section 101(18) defines "farming operation" as including, ". . . farming, tillage of the soil, dairy farming . . . ." The definition does not provide a simple all-inclusive list of tasks and activities (i.e., tillage of the soil, dairy farming). Instead, the section starts out in general terms—"Farming operation includes *farming*, tillage of the soil, dairy farming . . ." (emphasis added). Implicit in this definition is the inclusion of general activities inherent in farming and, we believe, the means (or in this case the equipment) necessary to perpetuate the farming operation the definition speaks of. When a farmer sells some of his machinery in an effort to scale down his operation (say from 200 - 100 acres) and save the farm, the

money received is inescapably from the 50% of the farming operation dissolved.

We believe this to be a pragmatic viewpoint. A contrary result would reap illogical results which we are confident Congress had no desire to create. Farmers in financial trouble could harvest their crop on a given year, decide to scale down their operation, sell machinery and be considered non-farmers under § 101(17) even though they had no significant outside employment or income. Suppose Armstrong had no income from farming rent or the seed company. After all, many legitimate farmers do not rent land or receive wages from outside companies. Given this scenario Armstrong could have made money solely from the sale of beans and corn (and inconsequential income from elsewhere) and yet still have been considered a non-farmer. This result is illogical, undesired and unnecessary. One envisions large numbers of cases where farmers, by merely pruning their operations and selling their equipment, are no longer considered farmers for purposes of the bankruptcy code. We do not believe Congress envisioned such a scenario and believe a broader interpretation is necessary.

Farmers are exempted from the commencement of involuntary cases under Title 11 ". . . because of the cyclical nature of their business. One drought year or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors, should not subject him to involuntary bankruptcy." See Senate Report No. 95-989 as found in the Historical & Revision Notes of Title 11. This rationale is steeped in the concept of risk; farmers are caught in a risk-ridden enterprise. To say that the implements which are necessary to perpetuate the enterprise are not part of the enterprise is not logical, especially

when, as in the instant case, the implements are sold to keep the enterprise, in its failed form, afloat. We may have reached a different result if the record had revealed that Armstrong had a history of buying and selling equipment on an experimental basis or for investment purposes. However, the record in this case inescapably points to the fact that the sale in this case was, ". . . a sale of a portion of the equipment of a person in financial trouble." See Bankruptcy Court Opinion and Order of December 1, 1982, page 4. The record reveals the equipment was a necessity for the farming operation, not a detached investment distinct from the farm. Hence, we conclude it was part of Armstrong's "farming" within the meaning of the definition of "farming operation" found at § 101(18).[1]

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[1] This reasoning represents a logical extension of the reasoning found in cases such as *Middleton v. Farmers State Bank of Fosston*, 45 B.R. 744 (Bkrtcy. 1985) where the court ruled § 522 (f)(2)(B) exemptions were to be read broadly enough to include farming equipment as "tools of the trade" under that section:

> This Court agrees with the District Court's broad reading of § 522(f)(2)(B). . . . Farmers are forced to use large expensive implements to be farmers. Modern day farming requires large capital investments to purchase the implements necessary for farming. They should not be penalized by a closing off of their rights to exemptions simply because they choose farming as a means of supporting a family. Plaintiff's narrow reading of the exemption runs counter to the goals of the Bankruptcy Code, *Id.* at 748. (Citations omitted.)

(for related cases in this area supporting the concept that farming equipment is part of the farming operation and inescapably tools of the farming trade for purposes of a § 522(f)(2)(B) exemption, see *In re La Fond*, 791 F.2d 623, 627-28 (8th Cir. 1986); *Flick v. United States through Farmers Home Administration*, 47 B.R. 440 (D.C. 1985); *In re Yoder*, 32 B.R. 777 (Bkrtcy. 1983)).

III

We reach a different conclusion concerning Armstrong's request that we include his rental income from rented farm land for purposes of §§ 101(17) and (18). In 1981 Armstrong rented acreage to a man named Hanlon. The bankruptcy court found Armstrong received the rent money from Hanlon in cash and up front. This is not a risk-laden venture in the nature of farming. It cannot be considered part of Armstrong's personal farming operation. Armstrong argues he actively participated in the tillage of the crops on Hanlon's acreage and provided fertilizer for that acreage. However, he admits he was not required to do so under the written lease arrangement with Hanlon. His help to Hanlon served to keep an eye on Hanlon, 1981 being the first year of what could more accurately be described as a landlord-tenant relationship.

In the arrangement described above, Armstrong is not exposed to ". . . the irregular nature and the potential ups and downs . . ." which ". . . would require a different test for an involuntary petition against a farmer . . ." See H.R. Doc. No. 93-137, 93d Cong., 1st Sess., pt. I at 224 (1973). Armstrong cites *In re Blanton Smith Corp.*, 7 B.R. 410 (1980) for the proposition that § 101(18)'s definition of "farming operation" should be given a broad interpretation. As stated earlier, we agree with this proposition, although our holding against Armstrong here does not contradict the ruling of *Blanton Smith*. In *Blanton Smith* the primary issue was whether an agribusiness or farming corporation could be considered a "farmer" pursuant to § 101(17). The debtor was involved in the processing, packaging and marketing of eggs. The laying birds were owned by the debtor but were cared for by separate

farmers (including a wholly-owned subsidiary of debtor) on approximately 30-40 farms in the surrounding area. The debtor in *Blanton Smith* provided the food, supplies and medication for the birds. It then collected and marketed the eggs from the independent farmers. The bankruptcy court ruled that while the debtor was not "an *individual* personally engaged" in the farming operation (under § 101(17) of the Bankruptcy Act of 1898) it was a farmer nonetheless.

In *Blanton Smith,* the debtor was exposed to the inherent risks of raising laying birds and producing eggs. The debtor owned the birds and provided food and medication. If, for example, a disease hit the area and all the birds became sick or died, the debtor's fortunes would have been tied to these unavoidable risks. In contrast, in the case at bar, Armstrong received cash up front from his rental arrangement with Hanlon. Had disease or bad weather ravaged Hanlon's crops, Armstrong would have had his rent money regardless. There was no risk involved. Armstrong was insulated from the traditional risks of farming. In *Blanton Smith,* the debtor's income was tied to his personal efforts; in the case at bar the lease or rental arrangement removed the risk. See H.R. Doc. No. 93-137, 93d Cong., 1st Sess., pt. II at 74 (1973). Any efforts by Armstrong to help Hanlon were to protect this risk-free rent arrangement with Hanlon, perhaps with an eye to the next planting season. Surely, such an arrangement was not within the meaning of § 101(18).[2]

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[2] The dissent would have the bankruptcy court try to draw "realistic distinctions" on a case by case basis "focusing on whether the income . . . is essentially derived from a farming

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operation . . . owned or operated by the recipient of the income and that reflects traditional farming risks." Yet Armstrong's secural of payment "up front" certainly severs him from any "traditional farming risks."

The dissent also states, "Presumably in the face of economic distress, Armstrong . . . leased the land to effect a retrenchment in his operations . . . if Armstrong can show a firm purpose to farm his acreage again . . . the rental income could qualify." Hence the dissent would have a court try to grapple with the issue of a farmer's future intent. The results of such fact-finding would be haphazard and unfocused. Most farmers would say that their intention would be to farm the rented acreage in the future. After all, what would there be to lose? Indeed, a farmer could be sincere in saying this but be unrealistic in his estimation of his chances. Conceivably, a farmer could rent the land for a few years—each year telling the court (at yet another hearing) he was closer to solvency, closer to tilling. Of course, some farmers would inevitably be bluffing—deceiving the court while playing landlord. The dissent suggests courts look for, " . . . the first year of (a) lease, that the farm was financially troubled, . . . participat[ion] in actually operating the farm." This criteria is more vague than it sounds. It arguably would issue a blank check for one year to any farmer who wants to lease instead of till—as long as he demonstrates he operated at a loss the year before and indicates an "intent" to let the lease expire.

The dissent states we should not treat a farmer's land rental arrangements "mechanically." Yet, importantly, the opinion limits itself to "payment up front" arrangements which destroy the traditional inherent farming risks envisioned by Congress. Finally, the reason why the sale of Armstrong's farm machinery should not be compared to his rental of the farm land is because the machinery can only be sold once (and to the detriment of any acreage still being tilled by the selling farmer). In contrast Armstrong can rent his land over and over (even farming a year in between) and keep legal ownership over the asset.

The notion advanced by the dissent is a noble one and the need to help the plight of the poor farmer in despair is recognized by all. Yet the results of the (continuous) inquiries or hearings the dissent would like courts to conduct would be inaccurate and unwieldly. Scenarios that abuse the system are easy to concoct. At worst we would be creating an oft-abused vehicle for persons to use to avoid their obligations. Considering the legislative intent behind the relevant law, for Armstrong's type of risk-free situation, it is best to let Congress step into Armstrong's arena before we do.

To summarize: we conclude for reasons set forth above that Armstrong's income from the seed company's wages and from the rental of farming acreage is to be considered non-farm income for purposes of 11 U.S.C. §§ 101(17) and (18). Hence, Armstrong's 1981 gross income is less than 80% farming-derived and, pursuant to § 101(17), Armstrong is not entitled to the farmer's exemption found at § 303(a). The affirmance of the lower tribunals on these two items means the result of their rulings remains the same. However, since we rule the sale of the farming equipment should be considered as derived from the farming operation within § 101(18), the means to the end has changed.[3]

IV

With the above ruling in mind, the remaining issue is whether Armstrong can be considered a debtor within the meaning of 11 U.S.C. § 303(h)(1). 11 U.S.C. § 303(h)(1) reads in pertinent part:

> "... the court shall order relief against the debtor in an involuntary case under the chapter under which the petition is filed ... only if—

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[3] On the issue of how the interest income from Armstrong's farm account should be treated, we note that although Armstrong states it should be treated as a farm income, he presents literally no argument in his brief to support this assertion. The bankruptcy court held the interest income was non-farm income since "The income depended upon a bank, not tillage or production." (December 1, 1982 Op., p. 5). Since Armstrong presents no argument to convince us we should rule otherwise, we see no need to disturb the ruling of the lower tribunals. In this case, the dollar amount concerned appears inconsequential. Just as appellee failed to meet its burden in the bankruptcy court on the gasoline tax credit or refund or elevator dividend, similiarly Armstrong, by presenting no argument here, has failed to meet his burden in this area as well.

> (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts that are the subject of a bona fide dispute; . . ."

We agree with the lower tribunals that Armstrong can be considered a debtor. It is clear that Armstrong owes appellee $493,000, as evidenced by over a half dozen notes signed by Armstrong individually. Armstrong does not really dispute this. Instead, he argues the district court incorrectly added to this debt a $450,000 loan to the Armstrong Hybrid Seed Company. Armstrong argues the seed company debt was contingent as to liability on the first debt. He further asserts it was never established that he was in default on the seed company loan.

First, we find no persuasive rebuttal by Armstrong to the decision of the lower tribunals that the seed company debt is *not* contingent as to liability on the first debt of $493,000. Arguably, this first debt is in itself sufficient to declare Armstrong a debtor pursuant to § 303(h)(1), but we need not reach that determination. The record reveals Armstrong personally guaranteed $450,000 of the $453,911.62 loan to the seed company. This personal guaranty placed Armstrong in the position of an original promisor, immediately personally liable upon default of the seed company loan. No contingency status attaches. See, for example, *Illinois Law & Practice*, Vol. 20, Guaranty, Section 44, page 541. Further, while Armstrong argues it was never proven he was in default on the seed company loans, even he admits the bank received only "some" payments (see Armstrong brief, p. 18). This statement, weighed with the undisputed evidence that Armstrong was behind on his payments on the original $493,000 loan, leads to the rea-

sonable conclusion of the lower tribunals that Armstrong was failing to meet his payments on almost $1,000,000 worth of debts. Further, the bankruptcy court found Armstrong had only approximately 100 acres of land in his name at the time of the filing of this case. Having failed to keep current on the first $493,000 loan and having merely made—at best—"some" payments on the seed company loan, we find ample support for the determination made by the lower tribunals that Armstrong should be considered a debtor within the meaning of § 303(h)(1).

As a caveat, we feel compelled to note that on October 27, 1986 the President signed into law an amendment to Title 11 of the United States Code which creates two new categories in the definition section of § 101 entitled "family farmer" and "family farmer with regular annual income." Also created is a new chapter within Title 11, Chapter 12, which sets forth a reorganization plan for the "family farmer with regular annual income." This law is not applicable to the instant case because Armstrong cannot be classified under either definition. "Family farmer" is defined as

> "(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such

> individual and spouse's gross income for the taxable year in which the case concerning such individual or such individual and spouse was filed; or . . . "

"Family farmer with regular annual income" is defined as a

> ". . . family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title."

Armstrong cannot be considered a family farmer under the new law because his $450,000 debt arising from the seed company cannot be said to arise out of a farming operation within the meaning of § 101(18). The loan to the seed company was more in the form of venture capital than a loan to a farmer to be put into a farming operation (Armstrong admits wages he received from the company was non-farm income). Hence, considering the $450,000 outstanding loan to the seed company does not arise out of a farming operation, Armstrong fails to meet the criteria set forth in the new law. Almost 50% of his noncontingent, liquidated debt arises from outside of the farming operation. Therefore, the new amendments to Title 11, while helpful to many other farmers, are unhelpful to Armstrong.

IT IS SO ORDERED.

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority's analysis of the sale of farm machinery, but, applying the same principles to the rented farm land, I would remand to the bankruptcy court

to determine whether the land rentals were not equally "farm income." Both the land and the machinery were capital employed for farming operations. Presumably in the face of economic distress, Armstrong sold off the machinery and leased the land to effect a retrenchment in his operations. I agree with the majority that, since the machinery sale was integral to his farming operations, its proceeds should be deemed "farm income." It seems to me entirely possible that the land rentals are for the same reason equally "farm income."

I certainly agree with the general proposition that mere ownership of farm land, standing alone, does not establish the landowner as the owner of a "farming operation" under section 101(17). Congress did not intend to shield from involuntary bankruptcy a non-resident landowner whose rents happened to derive to some degree from farming operations taking place on his land. Rather, Congress established protection for those whose incomes are inherently cyclical and somewhat unpredictable, as are those of traditional farmers, subject to the vagaries and whims of weather and pestilence, yield and demand. I think that the fact Armstrong actually helped work the land is relevant, though hardly determinative. The essential question here is whether the land rental was an integral part of Armstrong's farming operation. The prior and proposed uses of the rented land are, of course, relevant.

If Armstrong was forced temporarily to rent this land for the same reason he was forced to sell his machinery —presumably to salvage what he could of his financially troubled farm—then the lease proceeds may be seen as income inherently tied to the uncertainties of farming and

thus derived from a farming operation. Similarly, if Armstrong can show a firm purpose to farm this acreage again in the near future, the rental income could qualify as an integral part of his farming operation. On the other hand, if the facts suggest that Armstrong has disposed of the land, cut his losses and abandoned the land as part of his own farming operation, then Armstrong looks like an owner only of land, not of a farming operation. In any event, the consequences of Armstrong's financial distress in farming should not lead mechanically to the conclusion that he is no longer a "farmer."

The facts of this case—that this is the first year of the lease, that the farm was financially troubled, that Armstrong participated in actually operating the farm on the leased land, that the land historically was farm land —suggest that the rental income might be treated as integral to Armstrong's own farming operation. The majority relies, however, on the facts that Armstrong received cash up front (and thus did not participate in the immediate agricultural risk) and was not *obligated* to assist in operating the farm.

On the record before us, I cannot conclude whether, in the totality of the circumstances, the rental income is "received" from Armstrong's farming operation. I would vacate and remand to the bankruptcy court to determine whether the land under lease is part of Armstrong's ongoing farming operation or whether it is a distinct and separate venture. This question allows no neat distinctions. Congress has provided only rough guidelines in defining what farm income is. Given the complex and difficult challenges to farmers today, it is appropriate

for courts to try to draw realistic distinctions, as must be done here, on a case-by-case basis, focusing on whether the income in question is essentially derived from a farming operation that is owned or operated by the recipient of the income and that reflects the traditional farming risks of cyclical and unpredictable income.

This attention to the factual context surrounding the production of income finds support in recent cases construing section 101(17) in similar situations. In *In re Dakota Lay'd Eggs,* 57 B.R. 648 (Bankr. N.D. 1986), the court cautioned that in characterizing income earned by an agri-business enterprise,

> the determination must be made by considering the character of the business and whether its income is derived from its own farming or production efforts as opposed to the farming and production efforts of others. . . . Is it a typical farming activity and, if so, whose farming activity is it . . . ?

Id. at 656. *See also In re The Blanton Smith Corp.,* 7 B.R. 410, 412 (Bankr. Tenn. 1980) (corporation that owned poultry, provided feed and supplies and marketed eggs could be farmer under § 101(17)); *In re California Land and Equipment Leasing Co.,* No. 283-03198-W-7, slip op. (Bankr. E.D. Cal. April 23, 1984) (because debtor "neither owned the land used nor operated the farming operation" he was not a farmer under § 101(17) but rather just a business contractor).

For these reasons, I would direct the bankruptcy court on remand to evaluate the circumstances surrounding the lease to determine if the rental income in ques-

tion is received from Armstrong's farming operation. On this aspect of the case, I therefore respectfully dissent.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 14, 1987

Before:

Hon. Richard D. Cudahy, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. William J. Campbell, Senior District Judge*

No. 85 C 3351

IN THE MATTER OF:
BERNARD ARMSTRONG,

Debtor-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division.

No. 85-3351

Richard Mills, Judge

---

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

ORDER

On consideration of the petition for rehearing filed by the debtor-appellant, a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 85-3351

BERNARD ARMSTRONG,

Appellant,

v.

CORN BELT BANK,

Appellee.

ORDER

MILLS, J.:

Is the Appellant a "farmer"?

No — not for bankruptcy purposes.

Therefore, he *can* be placed in involuntary bankruptcy under Chapter 7.

This appeal from a bankruptcy court decision presents the issue of whether the appellant, Bernard Armstrong, is a "farmer" under the Bankruptcy Code (Code) and, if not, whether he can be adjudicated a debtor under Chapter 7 of the Code and placed in involuntary bankruptcy.

On March 31, 1982, the Corn Belt Bank (the bank) filed a petition seeking to place Mr. Armstrong in involuntary bankruptcy pursuant to section 303(a) of the Code, 11 U.S.C. § 303(a). In compliance with section 303, the bank

alleged that Armstrong owed it more than $5,000, that Armstrong was not paying his debts as they became due, and that there were fewer than twelve non-contingent claims against Armstrong. *See* 11 U.S.C. § 303(b)(2).

The bankruptcy court issued two separate orders in this case: the first finding Mr. Armstrong a non-farmer, thereby qualifying him for involuntary bankruptcy provisions, and the second (issued some 2 years later) finding him a Chapter 7 debtor subject to involuntary bankruptcy. The bank's initial contention is that this Court lacks jurisdiction to review the bankruptcy judge's first order finding Mr. Armstrong a non-farmer.

On December 1, 1982, the bankruptcy court ruled on the bank's petition and ordered that Mr. Armstrong be placed in Chapter 7 bankruptcy. In so holding, the court decided that Mr. Armstrong was not a "farmer" during fiscal 1981, and therefore that section 303(a) does not preclude an involuntary case against him. Believing that this was the sole issue to be decided in ruling on the bank's petition, the court then granted the petition, placing Mr. Armstrong in bankruptcy.

However, on January 14, 1983, the parties filed a stipulation to *partially* vacate the December 1, 1982, order. They agreed that the issue of whether Armstrong was a "debtor" was still pending and had to be ruled upon before the petition could be granted. Pursuant to this stipulation, the December 1 order was "amended and vacated regarding the issue, finding, or adjudication of Bernard Armstrong as a Debtor . . ." That portion of the order holding Armstrong a non-farmer, however, remained standing as part of the original order. Mr. Armstrong did not

file an appeal of either the December 1 or the January 14, order.

Thereafter, on May 31, 1985, the bankruptcy court issued another opinion and order, holding specifically that Mr. Armstrong was a debtor under Chapter 7 of the Code and granting the bank's petition. Appellant filed a timely notice of appeal from this order. The bank now contends that because Armstrong did not immediately appeal the December 1 order (as modified on January 14), this Court is without subject matter jurisdiction to review the decision holding Mr. Armstrong a "non-farmer" under the Code. Armstrong maintains, on the other hand, that the December 1 order was not "final" and therefore the issue decided in that order was not appealable until the May 31, 1985, order granting the petition and affording the relief requested.

I

This Circuit has recently explained that both the current provisions governing bankruptcy appeals (28 U.S.C. § 158, adopted July 10, 1984) and the immediate predecessor to that provision (28 U.S.C. § 1293), only *final* orders by the bankruptcy courts are appealable to the district courts. *See Matter of Fox*, 762 F.2d 54, 55 (7th Cir. 1985); *Matter of Riggsby*, 745 F.2d 1153, 1155 (7th Cir. 1984). It seems reasonably clear in this case that the bankruptcy court's December 1 order was not final. This is true even in the bankruptcy context where the finality standard is more liberal than the standard generally applied in non-bankruptcy proceedings. *See in re Saco Development Corp.*, 711 F.2d 441, 444-46 (1st Cir. 1983). Despite the more liberal finality standard, bankruptcy cases

interpreting finality under 28 U.S.C. § 1293 establish the general rule that an order determining the rights and liabilities of the parties and remanding solely for an accounting is still interlocutory. *In re Goldblatt Bros., Inc.*, 758 F.2d 1248 (7th Cir. 1985) (citing *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744 (1976) ("Partial summary judgments limited to the issue of petitioner's liability . . . are by their terms interlocutory, see Fed. R. Civ. P.56(c), and where assessments of damages . . . remains to be resolved, have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291.") An exception to this rule exists where the accounting is merely mechanical or ministerial. *Shearson Loeb Rhodes, Inc. v. Much*, 754 F.2d 773, 776-77 (7th Cir. 1985).

In the case at bar, the order issued December 1 and partially vacated January 14 clearly did not conclusively determine the liability issue, much less reach the accounting stage. Rather, it decided a preliminary issue—whether Mr. Armstrong met the Code's definition of a farmer—that had been raised by the parties but which was not determinative of the case's outcome. Still remaining was the issue of whether Mr. Armstrong was a Chapter 7 "debtor" in that he was not generally paying his debts as they became due. Therefore, the order was interlocutory in nature. As such, Armstrong could not have immediately appealed the order without leave of court pursuant to 20 U.S.C. § 158(a). Under these circumstances, he did not waive his right to have the issue considered upon a timely appeal of the bankruptcy court's final judgment. Since Armstrong filed a timely appeal of the court's final judgment entered May 31, 1985, this Court has jurisdiction to

review the matter decided in the December 1 order. The Court will now turn to the merits of this appeal.

II

Appellant Armstrong raises essentially two grounds for reversal of the bankruptcy court's decision: (1) that the court erred in finding him a "non-farmer" under section 303(a) of the Code; and (2) that the court erred in holding that Mr. Armstrong was not meeting his debts as they became due. In reviewing the bankruptcy court's decision, the court's conclusions of law are freely reviewable on appeal. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *Matter of Multiponics, Inc.*, 622 F.2d 709, 713 (5th Cir. 1980). If this Court concludes that Mr. Armstrong was not a farmer under the Code, then it must be determined whether the bankruptcy court's finding that the debtor was not generally paying his debts as they became due was clearly erroneous. *Multiponics*, 622 F.2d at 709. The burden of showing that the bankruptcy court's findings are clearly erroneous is on the party seeking to reverse those findings; merely showing that the court could have reached another conclusion on the evidence presented is not sufficient. *In re Huntington, Ltd.*, 654 F.2d 578, 583 (9th Cir. 1981).

The first issue is whether Armstrong met the Code's definition of a farmer in 1981, the year prior to the taxable year the petition was filed. Under section 303(a) of the Bankruptcy Code, involuntary cases are not permitted against a farmer:

> An involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer or a corporation that is not a moneyed,

> business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced. 11 U.S.C. § 303(a).

The reason farmers are immune from involuntary petitions is explained in part by the legislative history of the statute, which states that farmers should be:

> . . . excepted because of the cyclical nature of their business. One drought year or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors should not subject him to involuntary bankruptcy.
>
> House Rep. No. 95-595, p. 322.

A "farmer" is defined by section 101(17) as a:

> . . . person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a *farming operation* owned or operated by such person.
> 11 U.S.C. § 101(17).

And section 101(18) defines a *farming operation* to include:

> . . . farming, tilage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock and production of poultry or livestock products in an unmanufactured state.
> 11 U.S.C. § 101(18).

As these definitions make clear, whether Mr. Armstrong was a "farmer" in 1981 depends upon whether he received more than 80% of his gross income from farming operations during the year. This, in turn, depends upon what

portions of his 1981 income should be considered "income from farming operations" or "farm income."

Mr. Armstrong's taxable year (a calendar year) immediately preceding the t[illegible]able year of the petition was 1981. During that year his gross income was composed of the following items:

Sale of Beans	$33,175.00
Sale of Corn	4,932.00
Sale of Machinery	29,500.00
Elevator Patronage Divided	72.00
Farming Rent	17,181.50
Gasoline Tax Credit	61.00
Gasoline Tax Refund	92.50
Interest from Farm Account	1,701.00
Wages from Armstrong Seed Co.	12,000.00
Non-farm interest	350.00
Non-farm interest	28.00
	$99.093.00

The bankruptcy court held that three of these items could not be considered "farm income": (1) the sale of farm machinery; (2) the farm rent ffland (3) interest from the farm account. All other items were included as part of Mr. Armstrong's "farm income." Excluding the above three items from farm income, Mr. Armstrong's farm income totaled $38,332.50 and represents only 38.68% of his total gross income for 1981. Because this is far less than the 80% required by § 101(17), the bankruptcy court ruled that Mr. Armstrong was not a farmer during 1981, and was therefore subject to an involuntary bankruptcy case.

The parties presently dispute only whether the sale of farm machinery and the farm rent should have been in-

cluded as farm income. Considering first the sale of farm machinery, appellant contends that farmers regularly buy and sell machinery and that this amount should be considered part of a farm's normal income. Appellant cites *Jenkins v. Petitioning Creditor—Ray E. Friedman,* 664 F.2d 184 (8th Cir. 1981) in support of his position that income must be earned from something more than a source collateral to farming operations for it to be not included in the debtor's farm income.

In *Jenkins,* an involuntary petition was brought against Mr. Jenkins who was both a farmer and a commodities broker. During the year previous to the petition, Mr. Jenkins earned gross income of approximately $60,000 from his farming operations, but did not realize any income from his commodities trading. In addition, Jenkins received $2,820 from the sale of hail insurance, a business he maintained in addition to farming. The Court held that because well over 30% of his income was derived from farming, the requirements of section 1(17) were satisfied. In so holding, the Court stated that "although Jenkins' commodities trading occurred on a regular basis and resulted in substantial losses, Friedman has not established that his trading activities were more than a collateral venture . . . " 664 F.2d at 187.

The facts of *Jenkins* cannot control the present case because unlike the situation before this Court, there was no dispute in *Jenkins* that well over 80% of Mr. Jenkins' income was derived from farming. Thus, the Court's statement in *Jenkins*—that it was not established that Mr. Jenkins' trading activities were more than a collateral venture—was merely another way of stating that Mr. Jenkins' other ventures did not amount to over 20% of his gross in-

come for the year. By contrast, the bankruptcy court's decision in this case held that the income from the sale of farm machinery was no more "than a sale of a portion of the equipment of a person in financial trouble." This view is supported by Mr. Armstrong's own statements that the sales were occasioned by a partial closing of his farming operation. Thus, the court felt that these sales were clearly more than a "collateral venture" and that the income from the sales did not constitute income from farming operations. Therefore, the case at bar is factually distinguishable from *Jenkins* and its result should not control this case. And as the bankruptcy court's decision is consistent with the law set forth in *Jenkins,* appellant's argument is without merit.

In holding that the farm equipment sales were not part of Mr. Armstrong's "farm income", the bankruptcy court also held that it would take the matter a step too far to say that the income was derived from tilling the soil or farm production. Rather, the court felt that a sharp distinction should be drawn between income from tillage or production itself, and income from equipment which tills and produces.

Such a distinction is valid in light of the legislative policy behind exempting farmers from involuntary cases. As previously noted, the overriding purpose of the exception is to protect those whose major source of income is dependent upon sales of ordinary farm products, such products being subject to the ravages of climate and fluctuating farm prices. *See In re Hines,* 7 B.R. 415, 418 (1980). Therefore, those who receive a substantial portion of their income (more than 20%) from transactions

such as equipment sales, which are not subject to those dangers, should not fall within the definitions of section 101(17) and (18). The exception was intended to protect a limited group of people and should not be extended to those who do not fall within the clearly defined limits of that exception.

In view of the express definitions of section 101(17) and (18) and the purpose for the farming exception, the distinction drawn by the Court below was warranted, and the Court was correct in not including the income from equipment sales in farm income.

III

As noted by the bankruptcy court, the exclusion of the $29,000 from the equipment sales alone excludes Armstrong from the Code's definition of a farmer. Nonetheless, the court proceeded to determine whether the farming rent should be included in farm income. The court held that it should not, and this finding will now be reviewed.

Citing *In re Blanton Smith Corp.*, 6 B.R. 1389 (M.D. Tenn. 1980), the bankruptcy court noted that Mr. Armstrong did not share any of the risks of farming with his tenant. Instead, he received his rent "up front", regardless of how well the farming operations were doing. For this reason, Mr. Armstrong's rent income had no connection to the dangers inherent in normal farm income, and the court held that it could not be included as "income from a farming operation" for the purposes of section 101(18). Appellant argues that the bankruptcy court erred in adding the risk element to the *Blanton Smith* case.

Blanton Smith held that a debtor cannot be denied the status of a "farmer" merely because it owns rather than operates a farming operation. 7 B.R. at 412. In its analysis, the Court carefully traced the legislative history of section 101(17) in order to show that Congress intended to expand the definition of "farmer" to include a farming corporation or agribusiness. In doing so, the Court noted that:

> . . . the definition of "farmer" under H.R. 8200 in terms of income derived from a farming operation "owned or operated" by such a person represented a departure from the law under the prior Act, which required that an individual seeking characterization as a farmer be *personally* engaged in farming or tillage of the soil. It was well settled under the old Act that one who owned a farm and leased it to a tenant was not a "farmer" within the meaning of the term when the owner did not personally participate in the cultivation or operation of the farm but merely received the rent therefrom. 1 Collier, Bankruptcy § 4.15[2.1] (14th ed. 1974); *see Beamesderfer v. First Nat'l Bank & Trust Co.*, 91 F.2d 491 (3d Cir.), *cert. denied*, 302 U.S. 686, 58 S.Ct. 35, 82 L.Ed. 530 (1937); *First Nat'l Bank & Trust v. Beach*, 86 F.2d 88 (2d Cir. 1936), *aff'd*, 301 U.S. 435, 57 S.Ct. 801, 81 L.Ed. 1206 (1937).
>
> 7 B.R. at 414.

In contrast with the old act, the current Act defines a farmer as a person who receives more than 80% of his income from a farming operation "*owned or operated* by such person." 11 U.S.C. § 101(17).

In this case, however, the bankruptcy court held that "mere ownership without risk is not enough." The Court

reasoned that although the debtor in *Blanton Smith* was a large agribusiness that owned hens located on farms where they were raised by others, the debtor shared the risk of farming by being the marketing end of the poultry production. By contrast, Mr. Armstrong received his rent up front and without taking part in the risk inherent in farming.

No case law directly on this point has been cited to us, nor are we aware of any. This Court believes, however, that the bankruptcy judge was not in error in drawing this distinction and in requiring that some connection with the risks inherent in farming be shown. The legislative history, while giving the term "farmer" a broad scope, also indicates an intent to protect only those whose income is derived from operations that are subject to climate, farm price fluctuation, and uncertain crop production. As stated in *In re Hines:*

> Certainly, Congress knew that farming is a speculative business. A farmer's annual income can vary substantially due to the farmer's dependence upon the weather, crop production, prices, etc. Due to the nature of his business, a farmer cannot readily ascertain with any degree of certainty, what his future income for the coming years will be.
>
> 7 B.R. at 418.

Clearly, rent income that is received "up front" and which is not subject to any of the natural risks of farming has no connection with this rationale. The Armstrong lease simply did not subject the landlord to any of the risks of operating a farm, risks that Congress specifically sought to guard again. It is clear that under the new act a person need not personally till the soil to be a farmer;

his income, however, must have some connection with the inherently speculative nature of farm income. As Mr. Armstrong's rental income did not, it was proper for the bankruptcy court to hold that the rental income is not "farm income." Accordingly, the bankruptcy court's findings that the sale of farm equipment and the rental income are not "income from a farming operation" pursuant to section 101(17) is AFFIRMED. Therefore, Mr. Armstrong is not exempt from an involuntary case under section 303(a) of the Bankruptcy Code.

IV

The final issue is whether the bankruptcy court's finding that Mr. Armstrong was not generally paying his debts as they became due was clearly erroneous. Section 303 (h)(i) of the Act provides that:

> The Court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts become due unless such debts that are the subject of a bona fide dispute . . .
>
> 11 U.S.C. § 303(h)(i) (1985 Supp.)

In determining whether a debtor is generally paying his debts as they become due, the Seventh Circuit in *Matter of Covey*, 650 F.2d 877, 883 n. 8 (7th Cir. 1981) held that the approach taken by the Texas bankruptcy court in *In re All Media Properties, Inc.*, 5 B.R. 126 (Bktrcy. S.D. Tex. 1980) is appropriate. In *All Media*, the Court stated that:

> . . . generally not paying debts includes regularly missing a significant number of payments to creditors or

> regularly missing payments which are significant in amount in relation to the size of the debtor's operation. Where the debtor has few creditors the number which will be significant will be fewer than where the debtor has a large number of debtors. Also, the amount of the debts not being paid is important. If the amounts of missed payments are not substantial in comparison to the magnitude of the debtor's operation, involuntary relief would be improper.
>
> 5 B.R. at 143. *See also In re Salem Corp.*, 29 B.R. 424, 432 (Bkrtcy S.D. Ohio 1983).

In the present case, the bankruptcy court found that Mr. Armstrong owed the bank over $493,000 as of the date the petition was filed. This debt is undisputed by the parties and is evidenced by notes signed by Mr. Armstrong individually. In addition, the court found that Mr. Armstrong personally guaranteed $450,000 of a $454,000 loan to the Hybrid Seed Company. In finding that these debts were not being paid as they became due, the court noted that Armstrong had just over 100 acres in his own name and was not current on the payments on the notes. Further, Mr. Armstrong himself stated that he could not have repaid a debt that was close to one million dollars. This Court cannot disturb those findings because the record supports the findings and they are not clearly erroneous.

Appellant argues, however, that the bank's claims against him for the loan guaranteed by Armstrong are contingent as to liability. Section 303(b)(1) gives the right to be a petitioning creditor to any holder of a claim except the holder of a claim contingent as to liability. *Matter of Covey, supra*, 650 F.2d at 881. Claims are contingent as to liability if the debt is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor

to the alleged creditor. *In re All Media, supra,* 5 B.R. 126. Appellant argues that the bank's claim involving the loan to Hybrid Seed Company, which Armstrong guaranteed, is contingent as to liability because it was never shown that Hybrid Seed Company had in fact defaulted on the loan.

Appellant's argument is without merit for two reasons: First, even if the guaranteed debt could be termed contingent as to liability, Armstrong still owes a clear non-contingent debt of almost a half-million dollars. This debt alone would easily justify the bankruptcy court's decision. Second, Armstrong unconditionally guaranteed to pay those notes by signing them individually. Under Illinois law, such a guarantee is regarded as an absolute undertaking to pay the note when the principal defaults. *See* Illinois Law & Practice, Vol. 20, Guaranty, § 44, at 541. In its findings of fact, bankruptcy court found that Armstrong was not current in payment on all the notes, including those involving the guarantee. And the Court noted that Mr. Armstrong offered no evidence to the contrary. As this factual finding is not clearly erroneous, it cannot be disturbed on review.

In accordance with the above, the decision of the bankruptcy court is AFFIRMED.

ENTER: December 10, 1985.

FOR THE COURT:

/s/ Richard Mills
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

Office of
Bankruptcy Judge

SPRINGFIELD, ILLINOIS 62705

BASIL H. COUTRAKON
Judge

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In Re: BERNARD ARMSTRONG
Bankruptcy No. 382-00487

OPINION AND ORDER

(Filed May 31, 1985)

On March 31, 1982, a Petition for Involuntary Bankruptcy was filed against Bernard Armstrong. As the Court understood that the only issue for the decision was whether or not Bernard Armstrong was a farmer, an Opinion and Order finding Bernard Armstrong a non-farmer and adjudicating him a Chapter 7 debtor was entered on December 1, 1982. An Order requiring Armstrong to file schedules was entered the same day.

Petitioning creditor Corn Belt Bank, now known as Bank Midwest of McLean County (the bank), and Bernard

Armstrong signed a Stipulation and Agreement to *Partially* Vacate the December 1, 1982 Order on January 14, 1983. (emphasis supplied) They agreed that the issue of whether or not Armstrong was a debtor was still to be decided. Hence, the December 1, 1982 Opinion and Order was "amended and vacated regarding the issue, finding or adjudication of Bernard Armstrong as a Debtor . . ." The Order to file schedules was entirely vacated. The Court's decision concerning Armstrong as a non-farmer remained standing as part of the original Opinion and Order.

The only issues necessary for resolution are: whether or not the bank holds at least $5,000 in claims not contingent as to liability, or subject to a bona fide dispute (Section 303(b) (2)); and whether or not Armstrong was generally not paying his debts as those debts became due unless, again, the debts are subject of a bona fide dispute. (Section 303(h) (1))

Evidence was heard in open Court. The following are the Court's findings of fact: Bernard Armstrong owed the bank $493,816.29 as of the date of the filing of the Petition herein on various loans which he signed individually. This amount may be greater as not all interest was calculated therein. Having personally guaranteed $450,000 of a $453,911.62 Armstrong Hybrid Seed Company loan, Bernard Armstrong also owed the bank to the extent of the guarantee. The bank presented a series of notes, clear and unequivocal on face that were signed by Bernard Armstrong. Whatever potential use was made of this money, Bernard Armstrong made himself responsible for the repayment. Further, the guarantees were equally clear and unequivocal.

Armstrong is not convincing when he suggests that the bank was forcing him to borrow money or that a bank officer tricked him into signing the notes individually. Mr. Armstrong had for a long time been signing notes for farm loans. He knew that he would be responsible for the notes. Significantly, on the notes for which the company was responsible he signed differently, to wit: "Armstrong Hybrid Seed, by Bernard Armstrong, not individually . . ." As Bernard Armstrong has not offered any convincing evidence to rebut the bank's clear showing of debt due individually and by way of guarantee, the Court finds that there is no bona fide dispute about the debts.

Lastly, the Court finds that Bernard Armstrong was not meeting the debts as they came due. Armstrong had little more than 100 acres in his own name at the time of the filing and was not current on the payments on the notes. Again, Bernard Armstrong offered no evidence to the contrary. Indeed, he admitted that he could not have repaid close to one million dollars in debt. (February transcript, page 40)

The Court has already determined that Bernard Armstrong is not a farmer. No appeal was taken of the part of the December 1, 1982 Order not vacated, i.e. that Armstrong does not meet the test for a farmer. Incidentally, the Court has not heard any evidence at trial to cause it to change its original Opinion.

With no other issues of law remaining, the Court concludes that Bernard Armstrong may be a debtor under Chapter 7 of the Bankruptcy Code. (11 USC §§ 701 et seq.)

Therefore, on this 31st day of May, 1985, an Order for Relief under Chapter 7 of the Bankruptcy Code is hereby entered against Bernard Armstrong.

/s/ Basil H. Coutrakon
Bankruptcy Judge

BHC:cf

APPENDIX E

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

Office of
Bankruptcy Judge
Springfield, Illinois 62705

December 1, 1982

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In Re: Bernard Armstrong
Bankruptcy NO. 382-00487

OPINION AND ORDER

This cause originated upon the filing of a Petition seeking to have Bernard Armstrong declared involuntarily in bankruptcy pursuant to 11 U.S.C. § 303. Petitioner Corn Belt Bank alleged that it was owed in excess of $5,000 not contingent as to liability, that Armstrong was unable to pay his debts, and that there were fewer than twelve non-contingent claims against Armstrong.

Armstrong moved to dismiss the bank's Petition on the basis that it failed to allege Armstrong is not a person against whom an involuntary case is prohibited and that Armstrong was in fact a farmer in 1981, the taxable year immediately preceeding the taxable year in which the Petition was filed.

Cases cited by Armstrong on his first contention concerning the pleading do not go as far as allowing for dismissal of an action for failure to plead in the negative. *In Re Brias,* 15 F.2d 693 (7th Cir. 1926) and *Canal Bank and Trust v. Brewer,* 18 F.2d 93 (5th Cir. 1927) spoke of the burden of proof being on the petitioning creditor.

On the other hand, even older cases found by the Court do suggest the stringent requirement that the creditor must allege the person is not a wage earner or a farmer. *Re Taylor,* 102 F.728, 4 ABR 515 (7th Cir. 1900).

The only relatively recent authorities the Court could locate have been less strict than were those from the early part of the century. *Hinrichs v. John Deere Company of Moline,* 314 F.2d 385 (7th Cir. 1962) spoke of this issue in a footnote as merely being one of the burden of proof on the petitioning creditor.

The most recent case, in fact the only Code case, actually speaks of the burden being on the debtor to *plead and prove* he is a farmer.

> In an involuntary case whether debtor is a farmer is a factual question to be pled and proven under 11 U.S.C. § 101(17) that more than 80% of his prior year's gross income was so derived. If he fails to plead and prove that he is a farmer, he has in effect consented to the entry of the order for relief. Being a farmer is not a jurisdictional fact, it is a defense to be pled and proven. *In re Johnson,* 7 BCD 1331, 1333.

The Court does not rely totally upon *Johnson* as that Court had before it a situation where the Petition had alleged that the debtor was not a farmer and where the debtor's answer was stricken for failure to obey a lawful order of the Court.

Despite the dearth of recent cases on exactly this subject of pleading, the Court takes note of the modern rules of pleading. "Construction of Pleadings. All pleadings shall be so construed as to do substantial justice." Federal Rule of Civil Procedure 8(f). So while the bank's Complaint could have been more precisely written, Armstrong is not thereby led away from the central issue. The parties know, through extensive pre-trial discussions and through briefs, that the major issue is whether or not Armstrong is a farmer.

Besides, the Court could easily ask the bank to amend its Petition. For example in *Armstrong v. Fernandez,* 208 U.S. 324, 52 L.Ed. 514, 28 S.Ct. 419, 19 ABR 746 (1908) the Supreme Court acknowledged the necessity of pleading that the debtor was a non-farmer while acquiescing in the bankruptcy court's allowance of an amended Petition to include the proper allegations. Yet as the parties are all well aware of the issues, the Court will not waste anyone's time with further pleading and answer. It is therefore held that the part of Armstrong's Motion to Dismiss based on a lack of pleading that Armstrong is not a person against whom an involuntary case is prohibited is denied. Following its reading of the modern rules of pleading and the *Hinrichs* case the Court will nonetheless place the burden of proving Armstrong a non-farmer upon the bank.

The heart of the case is the contention that Armstrong was a farmer in 1981. This second issue is one which the parties have agreed to have the Court decide now, based upon briefs and affidavits.

Section 303(a) will not allow an involuntary case against a farmer.

> An involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.
>
> 11 U.S.C. § 303(a).

The legislative history of Section 303(a) speaks of farmers as

> excepted because of the cyclical nature of their business. On drought year or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors should not subject him to involuntary bankruptcy. House Rep. No. 95-595, p. 322.

Section 101(17) defines farmer as a

> . . . person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person. 11 U.S.C. § 101(17)

Section 101(18) defines a farming operation to include

> . . . farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.
>
> 11 U.S.C. § 101(18)

Bernard Armstrong's taxable year (a calendar year) immediately preceding the taxable year of the Petition was 1981. During that year his gross income was composed of the following items:

Sale of Beans	$33,175.00
Sale of Corn	4,932.00
Sale of Machinery	29,500.00
Elevator Patronage Dividend	72.00
Farming Rent	17,181.50
Gasoline Tax Credit	61.00
Gasoline Tax Refund	92.50
Interest from Farm Account	1,701.00
Wages from Armstrong Seed Co.	12,000.00
Non-farm Interest	350.00
Non-farm Interest	28.00
TOTAL GROSS	$99,093.00

Armstrong contends that only the non-farm interest and the wages do not constitute farm income. The Court does not have any evidence before it concerning the gasoline tax credit and refund or the elevator patronage dividend. As the bank has not met its burden of proof on those last three items, the Court will treat them as part of farm income.

The first major amount in contention is for the sale of machinery. Armstrong contends that farmers regularly buy and sell machinery and that this amount represents such a normal farming transaction. On the other hand the Court cannot possibly see how this amount is anything more than a sale of a portion of the equipment of a person in financial trouble. There is no corresponding purchase of equipment. In fact the usual buying of new and selling of worn equipment by a farmer would normally result in a loss.

Secondly, to contend that the money was from the sale of equipment and that equipment tilled the soil is to

take the matter a step too far. While Congress may have wished to give a broad definition to the terms farmers and farming operation, it did so within the confines of Code sections 101(17) and 101(18). This item is not income from tillage or production, but income from equipment which tills and produces.

The exclusion of the $29,000 from the sale of equipment will in and of itself exclude Armstrong from the Code's definition of a farmer. Nevertheless the Court feels it necessary and obvious to treat two other items as non-farm income.

The farming rent in this instance is not farm income. While the Court is well aware that a farming operation can now be "owned" rather than just tilled, this mere ownership without risk is not enough.

The Court's reasoning in this regard follows that of *In Re Blanton Smith Corporation*, 6 B.R. 1389 (1980). Even though the debtor was a large agribusiness that owned hens located on farms where they were raised by others, the debtor was still considered a farmer. The distinction comes in the manner by which Armstrong and the corporation in *Smith* derived income. *Smith* shared the risk by being the marketing end of the poultry production. Each year Armstrong received all of his money "up front." Therein lies their difference.

It should also be mentioned that a similar distinction can be made in *Glick v. First National Bank of Columbus, Indiana*, 26 F.2d 398 (7th Cir. 1928) where the owner was held to be a farmer. In that case the owner voluntarily helped at the farm of his son-in-law tenant with whom he shared the expenses and the crop. For example:

> . . . the expense of threshing grain was to be borne jointly and equally by the parties; grain produced upon the farm was to be used for feeding the cows and hogs, and the balance sold, the proceeds of the sale to be divided equaly between the parties; the parties were to bear, in equal shares, the cost of the purchasing seed and fertilizer. Id. at 399.

Armstrong did volunteer much of his own labor to help his tenant (as did Glick) and did agree to pay for necessary repairs and improvements, taxes and insurance, but these latter items do not involve sharing any risk. The Armstrong lease simply does not involve the landlord in the cyclical nature of a farming operation from which Congress sought to alleviate a farmer in debt. A person need not personally have to till the soil as under the old Act, but there does need to be a connection to the very problems so inherent in the nature of farm income. There is no such connection here.

Finally the Court will not consider the "interest from Farm Account" as farm income. The income depended upon a bank, not tillage or production. Again the debtor attempts to take a step beyond what Congress defined. The fact that the principal might have come from a farm operation does not mean that the interest on that amount carries the same appellation. The interest was obviously from a banking operation, the cyclical nature of which this Court will not review.

The Court therefore rules that the following items constitute income from a farm operation:

Sale of Beans	$33,175.00
Sale of Corn	4,932.00
Elevator Patronage Dividend	72.00
Gasoline Tax Credit	61.00
Gasoline Tax Refund	92.50
	$38,332.50

As the farm income total of $38,332.50 represents only 38.68% of the total gross income for 1981, and is less than 80%, it is hereby ORDERED that Bernard Armstrong be adjudicated a debtor under Chapter 7 of the Bankruptcy Code.

Entered: December 1, 1982

/s/ Basil H. Coutrakon
Bankruptcy Judge

Copy: Robert L. Sullivan